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Paper No. 9
TJQ

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Heather's Gourmet Café, Inc.

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Serial No. 75/706,467

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Charles I. Brodsky for applicant.

Gi Hyun An, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

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Before Simms, Quinn and Wendel, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Heather Gourmet Café, Inc. to register the mark RAINBOW BLEND ("BLEND" disclaimed) for, as amended, "specialized roasted Arabica chocolate, coconut, rum and vanilla coffee beans available through computer communications and interactive television."[1]

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that

[1] Application Serial No. 75/706,467, filed May 12, 1999, alleging dates of first use of April 15, 1999.

applicant's mark, when applied to applicant's goods, so resembles the previously registered mark RAINBOW for a variety of goods, including "coffee"[2] and "vegetable based coffee lightener,"[3] as to be likely to cause confusion. Both registrations are owned by the same entity.

When the refusals were made final, applicant appealed. Applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

The Examining Attorney maintains that applicant's mark is dominated by the term "RAINBOW" that is identical to the entirety of registrant's mark RAINBOW. Thus, according to the Examining Attorney, the marks are substantially similar. The Examining Attorney also contends that the goods are legally identical (coffee) or related (coffee and coffee lightener). In connection therewith, the Examining Attorney submitted third-party registrations showing that the same entity registered the same mark for both coffee and coffee creamers. The Examining Attorney also was not persuaded by applicant's arguments that purchasers are sophisticated and that there have been no instances of actual confusion.

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[2] Registration No. 1,737,921, issued December 8, 1992; combined Sections 8 and 15 affidavit filed.
[3] Registration No. 1,220,190, issued December 14, 1982; combined Sections 8 and 15 affidavit filed.

Applicant argues that there is a difference between the overall commercial impressions that the marks convey to the relevant public. Without any support, applicant asserts that registrant's mark is weak. Applicant also contends that the goods move in different channels of trade, applicant's being sold online, whereas registrant's are sold in grocery stores and supermarkets. Further, applicant contends that purchasers of its coffee are sophisticated, and that there have been no instances of actual confusion between the marks. Applicant submitted an excerpt from its Website.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.[4] Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

[4] The fact that in this case the cited registrations list numerous goods other than coffee and coffee lighteners is of no moment. Likelihood of confusion may be found on the basis of any one item listed in the identification of goods. See: General Mills Fun Group, Inc. v. Tuxedo Monopoly, Inc., 204 USPQ 396 (TTAB 1979), *aff'd*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Insofar as the marks are concerned, we stress that we have considered the marks in their entireties, including the disclaimed term "BLEND" in applicant's mark. However, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For example, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..." Id. at 751. In this connection, "RAINBOW" is clearly the dominant part of applicant's mark, with the disclaimed generic term "BLEND" being relegated to a subordinate role because it has no source-identifying function. This is clearly reflected by the specimens of record that show the term "RAINBOW" in bold, thick letters followed by a "TM" designation; the term "BLEND" appears below in thin letters. Moreover, the term "RAINBOW" alone would likely be used in calling for applicant's goods. This dominant portion is identical to the entirety of the registered mark. In re Denisi, 225 USPQ 624 (TTAB 1985)[while not ignoring the caveat that marks must be considered in their

entireties when evaluating the chances of their being confused in the marketplace, where a newcomer has appropriated the entire mark of a registrant, and has added to it a non-distinctive term, the marks are generally considered to be confusingly similar].

Applicant would have us conclude that the cited mark is weak, contending that "[a]ny referral to the Trademark Office database would reveal the hundreds of Marks utilizing the mark 'RAINBOW' and the inherent weakness of its coverage." (brief, p. 4) Applicant failed, however, to make any third-party uses or registrations of record and, thus, applicant's contention is wholly unsupported. In any event, it would appear that registrant's mark is arbitrary for coffee and coffee creamers.

With respect to the goods, the identification of goods in one of the cited registrations includes "coffee." Although applicant elected to identify its coffee with more specificity, it must be assumed that registrant's "coffee" includes all types of coffee, including the blend of coffee beans sold by applicant via the Internet and interactive television. Thus, for purposes of comparing applicant's coffee beans with registrant's coffee in our likelihood of confusion analysis, these goods are virtually identical.

Applicant's attempt to draw a distinction between coffee and coffee beans falls far short.

The other cited registration includes "vegetable based coffee lightener" which we interpret to mean a coffee creamer. This product obviously is closely related to coffee beans of the type sold by applicant. As pointed out by the Examining Attorney, coffee and coffee creamers are complementary. In this connection, we have considered the third-party registrations based on use which the Examining Attorney submitted. The registrations show the same marks registered by the same entity for both coffee and creamers. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods listed therein, including coffee and creamers, are of a kind which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Applicant's arguments regarding trade channels are not persuasive. As alluded to above, registrant's coffee must be assumed to move in all normal channels of trade for such

goods, including sales on the Internet as in the case of applicant's coffee beans.

The goods would be purchased by the same classes of purchasers, namely ordinary consumers in the general public, but applicant contends that consumers of its coffee beans are sophisticated. More specifically, applicant contends that its coffee beans are "only available interactively, as specialty coffees available to gourmet coffee clubs and in conjunction with gourmet gifts and gift baskets...these goods are relatively expensive and only purchased with a certain amount of care and thought." (brief, p. 5)

We again are not persuaded by this argument. Our view is that most purchases of coffee are made with nothing more than ordinary care. Even gourmet coffee is a relatively inexpensive commodity, and is certainly subject to impulse purchase. See: Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1282 [when both products are relatively inexpensive, comestible goods subject to frequent replacement, purchasers of such products have been held to a lesser standard of purchasing care]. To the extent that consumers of gourmet coffee and coffee beans are more discriminating in purchases of their favorite brew, they nevertheless are likely to be confused

here as well, given the virtual identity between the marks RAINBOW and RAINBOW BLEND. Consumers familiar with registrant's coffee sold under the mark RAINBOW would be likely to believe, upon encountering applicant's mark RAINBOW BLEND for coffee, that this mark identified a variant blend of coffee originating from registrant.

Applicant's assertion of no actual confusion between the marks is without support. That is to say, applicant has failed to provide any specifics regarding the extent of use by applicant or registrant of their respective marks. Thus, there is no way to assess whether there has been a meaningful opportunity for confusion to occur in the marketplace.

Decision: The refusals to register are affirmed.